No. 80-1177

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN A. "JOHNNIE" CUMMINGS, Sheriff of Clinton County, Kentucky, Albany, Kentucky and
NEAL GUFFEY, Deputy Sheriff of Clinton County, Kentucky, Albany, Kentucky - Petitioners

versus

RANDALL DOBBS,
GEORGE RAY GUFFEY and
WESLEY AARON RIDDLE - - - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Cummings, et al. v. Dobbs, et al.)
(U.S.C.A. 6th Cir. No. 79-3150)

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QUESTION PRESENTED

Whether or not it is proper for a jury sitting in an action for violation of Civil Rights to consider attorney fees incurred in a state criminal proceeding, when the criminal proceeding in the lower court has not been concluded and no action has been taken on the actions below which result from the allowance of attorney fees?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

JOHN A. "JOHNNIE" CUMMINGS, Sheriff of Clinton County, Kentucky, Albany, Kentucky and

NEAL GUFFEY, Deputy Sheriff of Clinton County, Kentucky, Albany, Kentucky - *Petitioner*

v.

RANDALL DOBBS,
GEORGE RAY GUFFEY and
WESLEY AARON RIDDLE - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, John A. "Johnnie" Cummings, Sheriff of Clinton County, Kentucky, Albany, Kentucky and Neal Guffey, Deputy Sheriff of Clinton County, Kentucky, Albany, Kentucky, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on the 29th day of October, 1980.

OPINION BELOW

The opinion for the Court of Appeals for the Sixth Circuit not yet reported is as Appendage One hereto. The Order of the District Court, Western District of Kentucky appears as Appendage Two hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on the 29th day of October, 1980. A Petition for Rehearing was not filed and a rehearing en banc was not sought or asked for. This Petition for Writ of Certiorari was filed within ninety (90) days from the date of the Mandate. The Mandate of the Court of Appeals was issued on December 3, 1980. This Court's jurisdiction is invoked under 42 United States Code, Section 1983.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Fourteenth Amendment, Section 1:

> "No state shall make or enforce any law which shall abridge privileges or immunities of citizens of the U.S. nor shall any state deprive any person of life, liberty or property without due process of law nor deny any person within its jurisdiction equal protection of the laws."

42 United States Code, Section 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any

State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 United States Code, Section 1343:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (3) To redress the deprivation, under color of State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

STATEMENT OF THE CASE

The instant action was brought under the Civil Rights Act 42 United States Code, Section 1983 by the Respondents, Randall Dobbs, George Ray Guffey, Wesley Aaron Riddle against John A. "Johnnie" Cummings, Sheriff of Clinton County, Kentucky and Neal Guffey, Deputy Sheriff of Clinton County, Kentucky alleging that Cummings and Guffey violated the First, Fifth, Eighth and Fourteenth Amendments to the United States Constitution. The case was called for trial on July 14, 15, 16, 19 and 20th, 1976 in the

Federal Court for the Western District of Kentucky. The jury in that proceeding was unable to reach a decision. The case was then called for trial on September 25, 1978 and a jury verdict was returned finding for Randall Dobbs, George Ray Guffey and Wesley Aaron Riddle and awarding the sum of $3,150.00 compensatory damages and $7,500.00 punitive damages each. The Petitioners appealed to the United States Court of Appeals for the Sixth Circuit alleging that the decision of the United States District Court for the Western District of Kentucky was incorrect predicating their argument upon the improper application of the law of the case and improper award of compensatory and punitive damages. The U.S. Court of Appeals for the Sixth Circuit affirmed the Order of the District Court in its entirety (see Appendage One).

REASONS FOR GRANTING THE WRIT

1. The decision and the reasoning of the lower court is incorrect because that decision permitted the jury to consider, as an element of damage, an amount of attorney fees that the Respondents below contended erroneously to have paid for the defense of a criminal action. The testimony in this case on the part of the Respondents were to the effect that they owed a certain sum or sums of money for the defense of actions in the state court, namely possession of marijuana. The record discloses that this was the only element of damage incurred by the Respondent in this action. A close review of the record will indicate that the proceedings in the lower court in Kentucky have not been ter-

minated. There is no evidence presented by the Respondents that the attorney fees were reasonable or just. The only evidence was that these fees indeed were owed by the Respondents. The attorneys below were not called as witnesses to substantiate or verify this matter. Nevertheless, the jury was permitted and did have this item in considering the award to be given against the Sheriff and Deputy Sheriff of Clinton County.

The Court stated in the action of *Luckett* v. *Cohen,* 169 Federal Supp. 808 no injury to or interference with Defendant's business is alleged in and the claim therefore may not be sustained. The Court went on to say in this action the only injury complained of by Defendant is the expense of defending the suit. It is elementary that in the absence of a special statute so providing counsel fees are not recoverable by a successful litigant. The expense of successfully defending or maintaining suit is reimbursable solely by way of taxable cost.

Another case that gives insight into this problem is the case of *Union Leader Corporation* v. *Newspapers of New England, Inc.,* 218 F. Supp. 490 (1963). There the Court said, "Claim for attorney fees is an additional element of damages liable to a person who has sustained provable losses." The quality of counsel required and especially the necessary time expended on the case was a governing consideration. In the case of *Cape Cod Food Products, Inc.* v. *National Cranberry Association,* 119 F. Supp. 242, no evidence should have been heard on the question of attorney's fees be-

cause this is not an allowable element in proceedings under 42 USC 1983.

The actions of the lower Court had not been culminated, no final judgments had been reached and no appeal orders were enforced. Nevertheless only on the assertion of the Respondents were the jury members allowed to consider these attorney fees.

It is the contention of the Petitioners that this allowed the jury to consider an improper element of damage. It is normally the rule that only a judge can consider the allowance of attorney fees when it is not within the purview of a jury.

Thus the Petitioners due process was violated and they denied protection of the law when the Court permitted the jury to consider the improper element of damages in the award of attorney fees.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

ROBERT L. BERTRAM
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104 Cumberland Avenue
Albany, Kentucky 42602

Counsel for Petitioners

Date: January 13, 1981

CERTIFICATE OF SERVICE

I hereby certify that on this the 13th day of January, 1981, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Hon. Daniel T. Taylor, III, Attorney at Law, 1319 S. Second Street, Louisville, Kentucky 40208 and Hon. Wendell V. Lyon, Jr., Harris & Lyon, 122 North Main Street, Somerset, Kentucky 42501, counsel for the Respondents. I further certify that all parties required to be served have been served.

ROBERT L. BERTRAM
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and

EDDIE C. LOVELACE
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Albany, Kentucky 42602

Counsel for Petitioners

APPENDIX

No. 79-3150

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RANDELL DOBBS,
GEORGE RAY GUFFEY, and
WESLEY AARON RIDDLE - - - *Plaintiffs-Appellees*

v.

JOHNNIE CUMMINGS, Sheriff of Clinton Co., Kentucky, and
NEAL GUFFEY, Deputy Sheriff - *Defendants-Appellants*

ORDER—Filed October 29, 1980

BEFORE: ENGEL and KENNEDY, Circuit Judges, and PECK, Senior Circuit Judge.

Defendants appeal a jury verdict in a 42 U.S.C. § 1983 action which resulted in an award to each of the three plaintiffs of $3,150.00 in compensatory and $7,500.00 in punitive damages for defendants' use of excessive force in effecting plaintiffs' arrest for possession of drugs. Plaintiffs testified that defendants kicked and punched them and beat at least one with a club; threatened them and their companions with a gun; dragged one face down along a gravel driveway and pulled the hair out of another, all without provocation.

The case was first tried before the Honorable Rhodes Bratcher and resulted in a hung jury. The appeal is from the second trial before the Honorable Edward H. Johnstone. Defendants contend that Judge Bratcher dismissed three paragraphs of plaintiffs' complaint at the first trial, and that Judge Johnstone reinstated those paragraphs at

the second trial in violation of the "law of the case" doctrine. We do not reach the question whether Judge Bratcher did dismiss portions of the complaint at the first trial. The law of the case doctrine is merely a statement of the practice of the courts, and as such is not binding on the District Court. *Messinger* v. *Anderson,* 225 U. S. 436, 444 (1912). Counsel for defendants conceded on oral argument that whether to follow the law of the case is discretionary with the court. Appellants have not pointed to anything that suggests that Judge Johnstone abused that discretion. Defendants also contend that Judge Johnstone should have granted their motion for a judgment n.o.v., as the evidence does not support a finding that plaintiffs suffered any damages. To the contrary, we find that the evidence was more than sufficient to justify the jury's verdict.

Finally, defendants urge that the award for punitive damages was improper because the jury was motivated by sympathy and prejudice in making that award. Nothing in the record suggests that there was any improper motivation. The evidence before the jury justified punitive damages.

Accordingly, the judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman, Clerk

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

Civil Action File No. C 75-0016 B(B)

RANDELL DOBBS,
GEORGE RAY GUFFEY and
WESLEY AARON RIDDLE - - - - *Plaintiffs*

v.

JOHN A. "JOHNNIE" CUMMINGS, Sheriff of Clinton County, Ky., and

NEAL GUFFEY, Deputy Sheriff of Clinton County, Ky. - - - - - *Defendants*

JUDGMENT—Entered September 28, 1978

This action came on for trial before the Court and a jury, Honorable Edward H. Johnstone, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff, Randell Dobbs, recover of the defendants, John A. Cummings and Neal Guffey, jointly and severally, the sum of $3,150.00 for compensatory damages and the sum of $7,500.00 for punitive damages, for a total sum of $10,650.00, with interest thereon at the rate of eight percent as provided by law, and his costs of action.

It is Ordered and Adjudged that the plaintiff, George Ray Guffey, recover of the defendants, John A. Cummings and Neal Guffey, jointly and severally, the sum of $3,150.00 for compensatory damages and the sum of $7,500.00 for punitive damages, for a total sum of $10,650.00, with in-

terest thereon at the rate of eight percent as provided by law, and his costs of action.

It is Ordered and Adjudged that the plaintiff, Wesley Aaron Riddle, recover of the defendants, John A. Cummings and Neal Guffey, jointly and severally, the sum of $3,150.00 for compensatory damages and the sum of $6,500.00 for punitive damages, for a total sum of $10,-650.00, with interest thereon at the rate of eight percent as provided by law, and his costs of action.

Dated at Bowling Green, Kentucky, this 28th day of September, 1978.

Jesse W. Grider
Clerk of Court

By (s) Margie C. Duvall
Deputy Clerk

Copies to
Judge Johnstone
Mr. Lyon
Mr. Taylor
Mr. Bertram
Mr. Lovelace
Mr. Carroll